United States Circuit Court of Appeals for the Ninth Circuit

No. 10242

RUFO C. ROMERO, APPELLANT,

vs.

P. J. SQUIER, WARDEN, MCNEIL ISLAND, APPELLEE.

APPELLANT'S REPLY TO BRIEF OF APPELLEE.

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Cases Cited.

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The Unlawful Search.

Major Evans, the Federal officer, made arrangements with the police officers to secure a search warrant and the warrant was secured on behalf of Major Evans. He accompanied and was the leader of the raiding party. He was the first person to enter the house; he searched the premises; and there and then arrested appellant and took him to Fort William McKinley together with the things he seized. The participation of Major Evans was under color of his Federal office, and the search in substance and effect was the joint operation of the local and Federal officers. In that view, the effect is the same as though he had engaged in the undertaking as one exclusively his own.

The result was that Major Evans, though not vested with police authority, executed a search warrant issued out of a justice of the peace in the Philippine Islands, and used

such warrant as the basis of Federal prosecution. Various Federal courts, including the Supreme Court of the United States, have ruled and held that a State or police warrant when executed by Federal officers may not be used as the basis of Federal search and prosecution. That would be a violation of an accused constitutional right against unlawful search and seizure guaranteed him under the Fourth Amendment to the Constitution of the United States. (*Byars* v. *United States,* 273 U. S. 28.)

The stipulation referred to (Tr. 156) was not a stipulation that Major Evans was competent to execute a warrant issued by a civil court of the Philippines. Furthermore, appellant has the substantial and constitutional rights of safeguards against unlawful search and seizure, and counsel cannot make stipulations which operate as a surrender of his substantial right. Nor could counsel bind his client by admission or stipulation prejudicial to the client's cause of action or defense. (2 R. C. L. 990); (*Ball* v. *Bank of State,* 8 Ala. 590, 42 Am. Dec. 649; *Wabash, St. L. & P. R. Co.* v. *McDougall,* 18 N. E. 291.)

The Entrapment.

No criminal intent originated nor existed in the mind of appellant. The prosecution's principal witness, Gepte, was the agent of Major Evans who in turn secured the services of Agbay and Cabrera. These persons agreed among themselves to frame-up appellant, with Major Evans as the master mind. The only time appellant met these persons was a day before his arrest. It must be remembered that appellant was an intelligence officer (Tr. 166), and when he was solicited by these agents of Major Evans that a certain sultan (mythical person) desired to buy maps, it was then appellant's official duty to investigate the proposition for the purpose of apprehending the supposed sultan. The act charged appellant was part of the investigation to lure

the supposed principal buyer. The fact that there was really no person buying the maps, the mythical sultan who was the supposed buyer being only a pretext devised by Major Evans and his agents to trap appellant is the best proof or conclusion that the whole scheme was entrapment.

Appellee's incorrect statement as to the record.—Appellee, in his Respondent's Notes on the Record, made an incorrect statement. The untrue statement appears on page 19 of the Transcript as follows: "Romero (R. 288) was for sometime suspected as a Japanese agent". This was called to the attention of the District Judge, and upon investigation, concurred that the statement was incorrect. Examination of the court martial record, which is page 288 as noted by appellee, nor in the entire record would disclose no such statement.

Denial of Counsel.

The record shows that appellant was denied the assistance of counsel at the preliminary investigation. He attempted to retain one Major Lynch, a retired Army officer and a practicing attorney. His presence was denied. Then appellant requested the services of one Major Poblete, a Filipino United States Army officer and an attorney of high standing. He, too, was refused by the Army investigating authorities. How can appellee's counsel now state that appellant waived the presence and assistance of counsel?

In further reply to appellee's brief on the point of assistance of counsel, appellant does not here deem it necessary to make a repetition of the facts, points of law, and authorities appearing in the Brief for Appellant, pages 9 to 13, inclusive.

The Defective Record.

Appellee seems to have the impression that if the maps were included in the record transmitted to the Review

Board the contents would be divulged to unauthorized persons by reason of the statute entitling an accused or any person authorized by him a copy of the record of trial. Article of War 35, which requires that all the original records and evidence introduced in the proceedings must be transmitted to the Judge Advocate General of the Army, calls for the inclusion of the maps. But the copy for the accused does not require the incorporation of the maps. It is only in the original record transmitted to the Review Board of the Office of the Judge Advocate General that the maps in question should have been included.

The Question of Waiver.

Appellant did not waive the right of effective representation by counsel nor the ejection of his civilian counsel in certain stages of the trial. He did not make a formal objection, it is true, but his silence did not operate as a waiver. The Manual for Courts Martial, pages 136 and 137, provides in part as follows: "* * * a waiver of an objection does not operate as a consent where consent is required, and a mere failure to object does not amount to a waiver * * *".

As to the withdrawal of the maps at the conclusion of the trial, it is true that the trial judge advocate and the military defense counsel agreed to the withdrawal. But, in effect, they agreed to violate the act of June 4, 1920 (41 Stat. 794) and Articles of War 35 and 50½. That this agreement was of no effect and was not binding, does not require any further discussion.

The Cases Cited by Appellee Have Been Overruled.

Appellant submits his case with the knowledge that prior to the decisions in *Powell* v. *Alabama,* 287 U. S. 85; *Johnson* v. *Zerbst,* 304 U. S. 458 (decided May 23, 1938); and *Smith* v. *O'Grady,* 61 Sup. Ct. 572 (decided Feb. 17, 1941), it had

been universally held that habeas corpus cannot be used as a means of reviewing errors of law and irregularities occurring during the course of the trial; and the writ of habeas corpus cannot be used as a writ of error. However, much water has gone over the dam since that time; and these principles have been construed and applied so as to preserve—not destroy—constitutional safeguards of human life and liberty. The scope of inquiry in habeas corpus proceedings have been broadened. It has been definitely settled by the above last decisions of the Supreme Court of the United States that if the constitutional rights of an accused are violated, in the beginning or at any stage of the proceedings, the court loses jurisdiction.

The Supreme Court, in the *Powell* v. *Alabama* case, held that although an accused was in fact represented by counsel in the trial if he was not given effective aid so as to make it a fair trial, he was not represented by counsel within the meaning of the Sixth Amendment to the Constitution.

Compliance with the constitutional mandate is an essential prerequisite to a Federal court's jurisdiction. A court's jurisdiction at the beginning of a trial may be lost in the course of the proceedings due to failure to comply with the constitutional requirements.

In the present case, when appellant's constitutional right against unlawful search and seizure was violated, and further denied the assistance of counsel within the meaning of the Sixth Amendment, any proceedings thereafter was a denial of due process of law as secured by the Fifth Amendment to the Constitution, and such proceedings are void. The court martial was no longer a court of competent jurisdiction. The judgment of the court martial was absolutely void because it was rendered without authority of law and without jurisdiction. (*Byars* v. *United States,* 273 U. S. 28; *Powell* v. *Alabama,* 287 U. S. 85; *Johnson* v. *Zerbst,* 304 U. S. 458; *Smith* v. *O'Grady,* 61 Sup. Ct. 572.)

Conclusion.

The judgment of the District Court should be reversed, and a writ of habeas corpus be issued by this Honorable Court directed to the Warden, McNeil Island, Washington, and that your appellant be ordered discharged from detention and imprisonment thereat.

Respectfully submitted,

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